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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 120.

RITA GOTTESMAN, MARIE MATTIELLO and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS AND COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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Respondents' brief in opposition seeks to make a virtue of a necessity. Respondents have declined to discuss the antitrust laws and the judicial code. Instead, respondents have cited a single diversity case construing tort law of New York and the impact of a specific federal rule.

Statutes are not repealed nor decisions expunged by failure to discuss them.

Indeed, where a square conflict among the Circuits has arisen, too late for inclusion in our petition mailed May 26, 1964 but in ample time for inclusion and discussion by respondents, petitioners are obligated to bring such recent cases to the attention of this Court, even though respondents choose to ignore them.

The Third Circuit has now squarely held that Section 7 of the Clayton Act affords a private party relief of money damages for violation thereof. *New Jersey Wood Finishing Company* v. *Minnesota Mining and Mfg. Co.*, F. 2d (published May 25, 1964 in CCH Trade Regulation Reports, Para. 71,110). That case expressly conflicts with the instant case. That case expressly conflicts also with *Highland Supply Corp.* v. *Reynolds Metals Co.*, 8 Cir. 1964, 327 F. 2d 725. The lower court decisions in both such cases are cited at page 14 of our petition, but the appellate decisions are not discussed or cited by respondents.

Respondents also fail to discuss *J. I. Case, et al.* v. *Borak*, U. S. , determined by this Court on June 8, 1964 and cited on certiorari in our petition at pages 15 and 20.

Instead of treating with the points at issue, and the two questions presented in the petition, respondents state that there is only one question presented in the petition* and limit their arguments in essence to a claim that the case at bar is "highly particularized" (Resp. br., p. 6) and that the Court of Appeals is "fully familiar with this litigation" (Resp. br., p. 4). From these two totally unsupported propositions, respondents request this Court mechanically to deduce that review is unwarranted.

But this case is no more "highly particularized" than the Clayton Act itself. Six out of the eight active judges of the Second Circuit disqualified themselves (Pet., p. 2), obviously precluding that Court's being "fully familiar with this litigation".

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* The footnote on page 5 of respondents' brief is misleading. The District Judge's certificate (A-28) related to his entire order, and the petition for leave to appeal (A-2) sought leave to appeal the entire order. The "Questions Presented" (Pet. 3-4) are clearly the same as those presented to the Court of Appeals.

Treating first with the *J. I. Case* decision, this Court affirmed the reversal of a lower court which had held "that its jurisdiction was limited to declaratory relief in a private, as opposed to a government, suit alleging violation of 14(a) of the Act." [15 U. S. C. 78n(a)] The case at bar likewise holds that a private party is limited to declaratory and prospective relief under Clayton 7. Since this Court used the antitrust laws to illustrate the policy to be served by the Securities Exchange Act of 1934, it is patent that the decision below is repugnant to the *Case* decision. This Court stated:

> "To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief. Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements."
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> . . . . . .
>
> "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. As was said in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942):
>
> > 'When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.' See also *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 213 (1944); *Deitrick* v. *Greaney*, 309 U. S. 190, 201 (1940).

It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). Section 27 grants the District Courts jurisdiction 'of all suits in equity or actions at law brought to enforce any liability or duty created by this title. . . .' In passing on almost identical language found in the Securities Act of 1933, the Court found the words entirely sufficient to fashion a remedy to rescind a fraudulent sale, secure restitution and even to enforce the right to restitution against a third party holding assets of the vendor. *Deckert* v. *Independent Shares Corp.*, 311 U. S. 282 (1940). This significant language was used:

> 'The power *to enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.' At 288. See also *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946); *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U. S. 288 (1960); *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110 (1948)."

Since the Court below has held that a private action under Clayton 7 is declaratory and prospective only, the respondents' brief is not accurate when it indicates (page 7) that the ruling below does not curtail the nature or the scope of the evidence that petitioners may produce. Evidence to show a violation of the Clayton Act, already found by this Court as an ultimate fact, is irrelevant and immaterial to prove any point at issue in a private suit for

money damages under that section, if relief thereunder is purely declaratory and prospective. Respondents are flatly in error when they state, also on page 7 of their brief, that "virtually the entire record" in the government suit "is already in evidence in this case." The stipulation to which respondents refer provides that such evidence may be introduced "subject to the right of any other party to object on the ground of materiality or relevancy."

Obviously, the record in the government suit proving violation of Section 7 will be irrelevant and immaterial to prove money damages under that section, since the court has held that money damages may not be recovered thereunder. Furthermore, the trial judge may rule such evidence immaterial, because he has found that the final judgment in the government suit can be introduced only for "historical purposes and background material." In addition, such evidence may be ruled out because declaratory and prospective relief has already been granted in the final judgment in the government suit made March 1, 1962.

Respondents part company with the District Judge. Respondents argue (pp. 6-8 of Resp. br.) that no new trial will be necessary if the decision below is ultimately reversed on appeal. Not only will a new trial be necessary, but also an entirely new deposition-discovery will be necessary, unless after the first trial petitioners are forced into a new trial without the benefit of pre-trial discovery under a correct interpretation of the Clayton Act. For the District Judge clearly stated the purpose of his ruling (App. 17):

> "However, a different approach is necessary in this case in order to define the scope of 'deposition-discovery procedures.'"

Thus, the District Judge to whom this case is assigned for all purposes has fairly apprised the parties as to the nature

and quantum of proof which he will receive, and that he will undoubtedly prevent discovery of and render inadmissible evidence showing a violation of the Clayton Act and damage resulting therefrom, since he has held "[t]here can be no claim for money damage for violation of Section 7."

Manifestly, this is precisely the type of situation that §1292(b) was intended to remedy.

Respondents' reliance on the single case *Original Ballet Russe, Ltd. v. Ballet Theatre, Inc.*, 133 F. 2d 187 (2 Cir. 1943) is misplaced. In that diversity suit the Court of Appeals properly held that where it was alleged defendants (1) induced the breaking of contracts and (2) maliciously made false statements, such allegations might be combined in a single count for tortiously interfering with the plaintiff's business under New York law. This is far different from the specific grant of federal jurisdiction to adjudicate federal rights under both the Clayton Act and the Sherman Act.

The short answer to respondents' argument is that Congress has provided in the Clayton Act a private right to sue for injury, with its own separate and distinct burden of proof which, as our petition points out (Pet. pp. 11, 18), and as is emphasized by the dissenting opinion of Mr. Justice Harlan in *United States* v. *First National Bank and Trust Company of Lexington*, U. S. (April 6, 1964), is a different cause of action and has a different burden of proof from the Sherman Act.

Moreover, Section 7 of the Clayton Act has undoubtedly become the principal weapon in the antitrust arsenal. From January 1, 1955 until January 1, 1963 the Department of Justice filed 68 cases under Clayton 7, and of those

cases only 16 also alleged violations of other antitrust laws. A. B. A. *Section of Antitrust Law, Merger Case Digest* (1963). It is clear, therefore, that Section 7 of the Clayton Act, having its own distinct burden of proof both for the government and for private parties, is now the principal statutory device to prevent restraint of trade and monopoly via concentration of assets and stock ownership.

It would be a statutory anomaly indeed which provides for the atrophy of private actions under the very law which was enacted to encourage them, and which blocks proof of damage in private actions while providing treble damages. While the public right of action may be sustained by "probability", damage inflicted by du Pont, caused by violation of Section 7 and while in violation thereof, creates the private right of action. Probability must be construed to precede actual damage, not to preclude it.

What the respondents are asking this Court to do by urging that only a "legal theory" has been affected by the decision below, is to disregard this Court's decision in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699, and approve the lower court's "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each". The government litigation under Section 7 of the Clayton Act is certain to result in a large number of private antitrust suits under that Section, all of which will be fragmented and compartmentalized for years to come, unless this Court now reviews the decision below that "There can be no claim for money damages for violation of Section 7."*

* This litigation is further fragmented and compartmentalized in time—almost into separate "antitrust years", as it were—by the indefinite stay of the *Schiff* action (referred to on pp. 8-9 of Petition and at p. 4 of Resp. br.). There, the Court of Appeals has

While no list of presently pending cases can be exhaustive, the conflict already existing between the *Highland Supply Corporation* case, *supra*, where that court has "compartmentalized" and fragmented private remedies as in the case at bar, with the decision in *New Jersey Wood Finishing Co., supra*, should now be resolved by this Court. Petitioners submit that the following excerpts from the Third Circuit's decision correctly and conclusively show the necessity of reviewing the case at bar and correcting the court below (CCH, Para. 71, 110, May 25, 1964):

> "N. J. Wood's claim arises in the first instance under Section 4 of the Clayton Act, which provides that 'persons' injured by violations 'of the antitrust laws' shall be entitled to threefold damages. 15 U. S. C. 15 (1958) 'Antitrust laws' as that term is employed in Section 4 has a restricted meaning. Notwithstanding other antitrust acts prior or subsequent to the Clayton Act, private parties can recover under Section 4, only where their injury has resulted from acts in violation of the specific antitrust laws, itemized in Section 1 of the Act.[3]
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> . . . . . .
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> "While Section 5 of the FTC Act was to be enforced by the FTC, Section 11 of the Clayton Act provided a scheme of dual enforcement of Sections 2, 3, 7 and

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denied a petition for a writ of mandamus to vacate such stay and has also dismissed an appeal of motions to consolidate the *Schiff* action and this consolidated *Gottesman* action. The *Schiff* action claims damages from at least 1936 to date. In this consolidated *Gottesman* action damages are barred prior to 1950.

A petition for certiorari will be filed to review the denial of mandamus and to review the denial of consolidation.

> "[3] These 'antitrust laws' are: The Sherman Act (Act of July 2, 1890, c.647, 26 Stat. 209); The Clayton Act (Act of October 15, 1914, c.323, 38 Stat. 730); and the Wilson Tariff Act (Act of August 27, 1894, c.349, Section 73-77, 28 Stat. 57 as amended Act of February 12, 1913, c.40, 37 Stat. 667)."

s of that act, by the FTC and the Justice Department; and while the underlying substantive violation of Section 5 (FTC Act) did not give rise to a private right of action (the FTC Act was not an antitrust law within the meaning of Clayton Section 4), a violation of Sections 2, 3, 7 and 8 did, no matter by which agency, if either of them, they were enforced. In short, the FTC Act bolstered the Clayton and Sherman Acts both by restraining evils, which might also constitute violations of those acts, and by reaching areas not covered by their proscriptions. These three acts are 'interlaced' remedially as well as substantively evincing a Congressional desire for a 'cumulative remedy' for the threats and dangers to trade and competition. See *Federal Trade Commission* v. *Cement Institute* [1948-1949 Trade Cases ¶62,237] 333 U. S. 683, 694-695 (1948); *United States* v. *Borden Company* [1954 Trade Cases ¶67,754] 347 U. S. 514, 518 (1954). 51 Cong. Rec. 16274-16275 (1914). The question here presented concerns in part the 'cumulative remedy' Congress provided for the violation of Section 7 of the Clayton Act. In the case at bar, both the FTC (under Section 11) and N. J. Wood (under Section 4) had brought actions based on the violation of Section 7."

* * * * * *

"The sole reason for Section 5 of the Clayton Act was to stimulate private antitrust suits * * * and aid such private suitors. As it appears that the FTC is the primary enforcing agency of Section 7 of the Clayton Act (see *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963)), to hold that such a proceeding was not within Section 5(b) would thwart in part the Congressional scheme for the enforcement of Section 7. We think it must follow that a Section 4 private right is preserved by a Government action to enforce Section 7, whether

> that action is brought by the Justice Department or the FTC; that it is not a question whether it is a judicial or an administrative proceeding but rather whether it is a proceeding on behalf of the United States to enforce the 'antitrust laws'."

Thus, the Third Circuit has held that a private right of action exists under Section 7 for money damages. The Court below has held to the contrary, blocking proof of any damage caused by du Pont's violation of Section 7. The vast amount of private litigation arising out of violations of Section 7 cannot be determined until this Court settles the question, as it ultimately must. Both *Case* v. *Borak*, *supra*, and the lower court decision in *N. J. Wood Finishing* case *supra*, were brought to the attention of the Court of Appeals below. As the appendix shows (pp. 34-35) the Court of Appeals was requested upon petition for rehearing *en banc* to await this Court's decision in the *Borak* case. In the foregoing circumstances, and in view of the fact that only two of the active judges of the Court of Appeals have failed to disqualify themselves in this proceeding, it is respectfully submitted that this Court should now take jurisdiction and furnish guidance in the interpretation of Section 1292(b) of the Judicial Code and Section 7 of the Clayton Act.

Finally, the challenge to this Court's jurisdiction implicit in the argument at p. 6 of respondents' brief cannot be countenanced, for it assumes this Court has no power to review abuse of discretion under the Judicial Code or the Federal Rules.

It is respectfully submitted that the petition should be granted.

Dated: July 10, 1964

Respectfully submitted,

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